PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

RAYMOND J. DONAHUE,	)	
	)	
Charging Party,	)	
	)	**ULP No. 08-11-637**
v.	)	
	)	
CITY OF WILMINGTON, DELAWARE,	)	**Decision on the**
	)	**Pleadings**
Respondent.	)	

BACKGROUND

The City of Wilmington, Delaware ("City"), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) ("PERA").

At all times material to the underlying issue in this Charge, Raymond J. Donahue ("Charging Party") was an employee of the City of Wilmington and a "public employee" within the meaning of 19 Del.C.§1302(o). The Charging Party held a bargaining unit position which is represented by AFSCME Local 1102 ("AFSCME" or "Union").

The underlying incident in this charge involves a dispute in which the City took disciplinary action against the Charging Party. A grievance was filed under Article IV of the 2001 – 2007 collective bargaining between the City and AFSCME. The grievance progressed through Step 3 of that procedure. On or about April 1, 2008, the City notified AFSCME's Staff Representative that it would agree to compensate Mr. Donahue based upon the unusual circumstances of the case, without precedent.

When Mr. Donahue had not received the reimbursement by September 22, 2008, he contacted the City advising its representative that he wished to exercise his rights under 19 Del.C. §1304(b), which provides:

> §1304. Employee Organization as Exclusive Representative
>
> (b) Nothing contained in this section shall prevent employees individually, or as a group, from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative of the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect. The right of the exclusive representative shall not apply where the complaint involves matters of personal, embarrassing and confidential nature, and the complainant specifically requests, in writing, that the exclusive representative not be present.

On or about November 3, 2008, the Charging Party filed an unfair labor practice charge alleging the City has refused to implement the settlement agreement, thereby abridging his rights under 19 Del.C. §1304(b), in violation of 19 Del.C. §1307(a)(1) and (a)(6).[1]

On November 14, 2008, the City filed its Answer admitting the material factual allegations but denying it had committed an unfair labor practice or violated the Public Employment Relations Act. The City's Answer also asserted the Charging Party lacked standing to bring the charge under the terms of the collective bargaining agreement between the City and AFSCME Local 1102.

[1] 19 Del.C. §1307, Unfair labor practices. (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
> (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

On November 21, 2008, Charging Party filed a Response denying the Affirmative Defense set forth in the City's Answer to the Charge.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board provides:

> (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines there is no probable cause to believe that an unfair labor practice may have occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will review such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
>
> (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice charge which may have occurred.

The pleadings in this case do not raise any material factual disputes or legal arguments which require additional support. The decision rendered herein is based upon the pleadings as required by Rule 5.6(b), above.

The City's letter of April 1, 2008 indicates the grievance was filed on Mr. Donahue's behalf by AFSCME Local 1102's Vice President and was processed through Step 3 of the contractual grievance and arbitration procedure. The underlying grievance concerned the length of time that an employee could be suspended pending investigation, prior to a pre-termination hearing. In its letter, the City acknowledges that in this case, there were unusual factors which affected the scheduling of the pre-termination hearing and which uncharacteristically extended the suspension period beyond thirty (30) days.

The City agreed to settle this grievance by compensating Mr. Donahue for the additional days he was suspended beyond thirty (30) days, without prejudice to its position that the contractual thirty (30) day suspension limit in the disciplinary section of the collective bargaining agreement does not apply to a suspension pending investigation and/or pre-termination hearings.

AFSCME was advised of the settlement of the grievance by letter dated April 1, 2008, which bears a stamp indicating it was received by AFSCME Council 81 on April 2, 2008.

The 2001 -2007 collective bargaining agreement between the City and AFSCME 1102 provides:

> Article IV, Grievance and Arbitration Procedure
>
> 4.4 Step Three.
> If, after a thorough discussion with the Department Head, the grievance has not been satisfactorily resolved, the Union Steward, the aggrieved Employee, the President of the Local Union, Chairperson of the Grievance Committee, and the Union Representative shall, after a written appeal, discuss the grievance with the Personnel Director or Designee as well as any persons deemed pertinent to the grievance within five (5) working days after the Department Head's response is due. The Personnel Director or designee shall respond in writing within five (5) working days after the meeting.
>
> 4.5 Step Four.
> If, after receipt of the decision of the Personnel Director or designee, the grievance has not been satisfactorily resolved, the Union or the Employer may request arbitration by registered or certified mail to the Personnel Director or to the President of the Local Union no later than fifteen (15) working days after rendering of such decision.
>
> 4.6 (a) During the next fifteen (15) working days mentioned in 4.5 or a longer period, if mutually agreed upon extension is arrived at, the representative from the City Solicitor's Office or designee, the Director of Personnel or designee, the Director of Council 81 or designee, and the Union President and Chairperson of the Grievance Committee shall meet and attempt to resolve the grievance.

The Charging Party has alleged that by failing to implement the Step 3 settlement agreement, the City has violated his rights under 19 Del.C. §1304(b), and also committed an unfair labor practice in violation of §1307(a)(1) and (a)(6). PERB has previously considered the impact and import of 19 Del.C. §1304(b) in *Bourdon and Delaware DHSS*, D.S. 03-08-400 , V PERB 3039 (2004), holding,

> [T]he protection afforded by subsection (b) is to the exclusive representative, to be present in any discussion (except the most confidential) wherein a complaint might be adjusted which could potentially impact the collective bargaining agreement. *Bourdon, p. 3049.*

In this case, AFSCME was placed on notice as to the proposed settlement by letter from the City, dated April 1, 2008, which indicated the settlement was in response to the Step 3 grievance filed by the Union on behalf of Mr. Donahue. The contractual grievance procedure provides the Union has fifteen (15) days following receipt of a Step 3 Answer in which to request the grievance be advanced to arbitration, unless a mutual agreement is reached to extend that time frame. There is nothing in these pleadings which indicates the City and AFSCME agreed to such an extension.

The purpose of the contractual grievance procedure is to resolve disputes arising under the collective bargaining agreement in a timely, efficient, and effective manner. Neither party has a right to unilaterally suspend the grievance process indefinitely either by inaction or by conditioning final resolution on an unnecessary affirmation.

Consequently, within a reasonable time following its notice to the Union, and upon not receiving a timely request to advance the grievance to arbitration, the City was entitled to rely upon the Union's inaction to resolve the grievance pursuant to the settlement agreement.

The decision reached herein is limited to the unique circumstances presented by this unusual case. This case is not decided based upon the individual right of the Charging Party to negotiate a grievance settlement with his employer, but rather on the obligation of the employer to comply with the terms of its contractual grievance procedure to resolve issues arising thereunder, and the corollary obligation of the union to insure that the grievance process is timely and effective by complying with the negotiated time lines. The grievance procedure is a mandatory subject of bargaining, and as such, may not be unilaterally changed by either party, either overtly or by inaction.

DETERMINATION

For the reasons set forth above, the City is hereby ordered to execute the grievance settlement as set forth in April 1, 2008 letter, "to compensate Mr. Donahue the additional days over the 30-day limit mentioned in the contract, without precedent."

IT IS SO ORDERED

DATE: 16 December 2008

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.